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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~[illegible]~~ 246

RICHARD DOUGLAS FURNISH, M. D.,

Petitioner and Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Defendant and Respondent,

and

THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE SECOND APPELLATE DISTRICT,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

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Petitioner and Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Defendant and Respondent,

and

THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE SECOND APPELLATE DISTRICT,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Petitioner, Richard Douglas Furnish, M. D., prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, entered on March 20, 1957, whereby the judgment dismissing the petition of petitioner for a Writ of Mandate in the Superior Court of the State of California in and for the County of Los Angeles against the Board of Medical Examiners of

the State of California to set aside its decision suspending petitioner from the practice of medicine for one year was affirmed; petition for rehearing was denied April 9, 1957; application for Court to grant rehearing on its own motion was denied April 19, 1957 and petition for hearing in California Supreme Court was denied May 15, 1957.

Opinions Below.

The opinion of the Court below, District Court of Appeal of the State of California in and for the Second Appellate District, affirming the judgment of the Superior Court of the State of California in and for the County of Los Angeles dismissing petitioner's petition for Writ of Mandate is reported in 149 A. C. A. No. 2, p. 361. The opinion is set forth as Appendix "A".

A petition for rehearing in the District Court of Appeal was denied on April 9, 1957. (149 A. C. A. No. 4, Minutes p. 4.)

An application to the District Court of Appeal to grant a rehearing on its own motion was denied April 19, 1957. (150 A. C. A. No. 1, p. 4.) The opinion denying the application to grant rehearing on the Court's own motion is set forth as Appendix "B". (150 A. C. A. 324.)

The petition for hearing in the California Supreme Court was denied on May 15, 1957. (48 A. C. No. 12, Minutes p. 2.)

A petition to withhold remittitur was denied by the District Court of Appeal on May 22, 1957. (150 A. C. A. No 5, Minutes p. 2.)

Jurisdiction.

The judgment of the District Court of Appeal was entered March 20, 1957. The petition for rehearing in the District Court of Appeal was denied April 9, 1957.

The application for the District Court to grant a rehearing on its own motion was denied April 19, 1957.

A petition for hearing in the California Supreme Court was denied May 15, 1957. The petition to withhold remittitur was denied May 22, 1957.

The constitutional issues here presented were urged in the lower Court. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1257(3).

Questions Presented.

(1) Is a conviction of a felony, not involving moral turpitude, based on a plea of *nolo contendere*, a ground for disciplinary action against a physician and surgeon under Section 2383 of the California Business and Professions Code?

(2) Is the 1951 amendment to Section 2383 of the California Business and Professions Code which seeks to make a conviction of a felony, without moral turpitude, a ground for disciplinary action against a physician and surgeon, an *ex post facto* law where applied to an act committed prior to 1951?

(3) Did the Board of Medical Examiners sustain its burden of proof that petitioner was convicted of a felony involving moral turpitude, as charged in the accusation?

(4) Was it an abuse of discretion to suspend the petitioner for one year?

(5) Does the State have the right to reject the finding by the United States Court on the question of whether a plea of *nolo contendere* deprived petitioner of his civil rights?

Statutes and Constitutional Provisions Involved.

Section 2383 of the California Business and Professions Code, before the 1951 amendment provided:

> "The conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct."

Section 2383 of the California Business and Professions Code, after the 1951 amendment, provides:

> "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct. A plea or verdict of guilty or a conviction following a plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section. The Board may order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information or indictment."

Section 6101 of the California Business and Professions Code, before its amendment, provided:

"Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension as provided in section 6102.

"The record of conviction shall be conclusive evidence and the clerk of the court in which the conviction is had shall, within thirty days thereafter, transmit a certified copy of the record of conviction to the Supreme Court. The proceedings to disbar or suspend an attorney shall be undertaken by the court upon the receipt of the certified copy of the record of conviction.

"A plea or verdict of guilty is deemed to be a conviction within the meaning of this section."

Section 6101 of the California Business and Professions Code, after its amendment, provides:

"Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension.

"In any proceeding, whether under this article or otherwise, to disbar or suspend an attorney on account of such conviction, the record of conviction shall be conclusive evidence of guilt of the crime of which he has been convicted. The clerk of the court in which an attorney is convicted of a crime involving, or appearing from the record of conviction probably to involve, moral turpitude, shall, within 30 days after such conviction, transmit a certified copy of the record of conviction to the Supreme Court. The State Bar of California may procure and transmit such record of conviction to the Supreme Court when the clerk has not done so or when the conviction was had in a court other than a court of this State.

"The proceedings to disbar or suspend an attorney on account of such conviction shall be undertaken by the Supreme Court, pursuant to the procedure provided in this section and Section 6102, upon the receipt of the certified copy of the record of conviction.

"A plea or verdict of guilty or a conviction after a plea of *nolo contendere* is deemed to be a conviction within the meaning of said sections."

Article I, Section 10, of the United States Constitution provides that no State shall "pass any bill of attainder or ex post facto law."

Statement of the Case.

Petitioner, a practicing physician and surgeon for the past twenty years, licensed by the State of California [Certified Record, Clk. Tr. p. 14] was convicted on a plea of *nolo contendere* on or about May 4, 1953, in the United States District Court for the Southern District of California, Central Division, to two counts of violating Title 26, United States Code, Section 145(b), charging that he attempted to defeat and evade income tax for the years 1947 and 1948. [Certified Record, Clk. Tr. pp. 51-52.]

Judge Yankwich sentenced the petitioner to pay a fine [Certified Record, Clk. Tr. pp. 51-52] and at the time of passing sentence stated:

"This case is different from the usual one involving a physician. Many a time a physician involved in income tax difficulties is one who resorts to unethical practices and who then tries to cover them up by covering up his income tax. In this particular case there is no such thing. There is no income indicated from any improper sources. This is really

the case of a person who has become involved because of his lack of experience in financial matters and his failure to surround himself with persons who, while he is carrying on his work, would watch his finances and see that a proper report is made . . . . I think the man's past life is not such that probation would be necessary. I think on a plea of *nolo contendere* they do not consider it—at least, the Medical Board does not consider that as a ground for revoking his license and, unless they have professional grounds, certainly his license should not be revoked for this particular offense. I am sure it would be revoked if I imposed any sentence other than a fine, although, technically speaking, a plea of *nolo contendere* does not carry with it any of the civil penalties." [Certified Record, Clk. Tr. pp. 63-64.]

Thereafter an accusation was filed against the petitioner by the Board of Medical Examiners of the State of California charging him with being convicted of felonies and criminal offenses involving moral turpitude, to-wit, two counts of violation of Title 26, United States Code, Section 145(b), and prayed that the license of the appellant be suspended or revoked. [Certified Record, Clk. Tr. pp. 39-40.]

That during the hearing on the accusation there was introduced into the record in behalf of the State Board of Medical Examiners a certified copy of the record of the United States District Court showing the conviction of your petitioner on his plea of *nolo contendere* and the fine imposed. [Certified Record, Clk. Tr. pp. 49-52.]

There was introduced into the record on behalf of your petitioner his affidavit in accordance with the Administrative Procedure Act. That the affidavit provided in part that your petitioner "never had any intention of defraud-

ing the United States Government of any income taxes and did not knowingly attempt to do so." The affidavit further provided that your petitioner's

> "entire adult life has been devoted to the practice of medicine and surgery. That (he) has had no training in accounting or bookkeeping and has no knowledge of accounting or bookkeeping methods or procedure, and is wholly inexperienced in the preparation of income tax returns. That during the years mentioned in the accusation and for some years prior thereto (he) employed various persons for the purpose of keeping books and records, making bank deposits and rendering bills, including one person who was his business manager. (Petitioner) devoted his time entirely to his medical practice and left the keeping and supervision of his records to his employees . . . These returns were prepared by a public accountant who obtained the data for the preparation of the returns from employees of (petitioner) . . . (He) reasserts that he did not knowingly attempt to evade any part of his income taxes due the government." [Certified Record, Clk. Tr. pp. 58-62.]

Counsel for the Board of Medical Examiners during the hearing on the accusation stated:

> "I would like to make clear that at the present time the Board of Medical Examiners is not seeking to discipline this respondent (petitioner) for the conviction of an offense involving moral turpitude. I believe that under the present state of the record in the absence of facts to establish that these particular convictions were in fact involving moral turpitude the complainant has not sustained the burden of proof on the issue of moral turpitude." [Certified Record, Clk. Tr. p. 66.]

The position of the Board of Medical Examiners is that under Section 2383 of the Business and Professions Code conviction of a felony based on a plea of *nolo contendere* is a ground for disciplinary action. [Certified Record, Clk. Tr. p. 67.]

Section 2383 of the Business and Professions Code originally provided as follows:

> "The conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct within the meaning of this chapter . . ."

This section was added by the Statutes of 1937, Chapter 414, page 1377, based on prior statutes.

The section was amended by the Statutes of 1951, Chapter 792, paragraph 1, providing as follows:

> "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter . . . A plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section. . . ."

That after the conclusion of the hearing the hearing officer for the Board of Medical Examiners submitted on March 9, 1955, a proposed decision finding that the petitioner was convicted of two felonies and proposed that the petitioner be suspended for a period of one year, and that the order of suspension be stayed and the petitioner placed on probation for a period of three years, on condition that he shall obey all laws of the United States and the State of California and its political subdivisions, and all rules and regulations governing the practice of medicine and surgery. [Certified Record, Clk. Tr. pp. 78-80.]

That the Board of Medical Examiners did not adopt the proposed decision of the hearing officer, and based on the findings of fact of the hearing examiner ordered on November 10, 1955, that the petitioner be suspended from the practice of medicine and surgery for a period of one year. [Certified Record, Clk. Tr. pp. 77-80, 100-101.]

That thereafter a petition for rehearing was filed by your petitioner with the Board of Medical Examiners which was denied. [Certified Record, Clk. Tr. pp. 104-113.] Thereafter your petitioner filed a petition for writ of mandate in the Superior Court of the State of California in and for the County of Los Angeles. [Certified Record, Clk. Tr. pp. 1-29.] That by stipulation and order of Court the administrative record "In the Matter of the Accusation of Richard Douglas Furnish, M. D., Respondent, Board of Medical Examiners Case No. D-284," was incorporated by reference and made a part of your petitioner's petition for writ of mandate. [Certified Record, Clk. Tr. pp. 30-113.]

The respondent, Board of Medical Examiners, demurred to the petition, and after hearing by the Court the demurrer was sustained without leave to amend, and the petition was dismissed. [Certified Record, Clk. Tr. pp. 114-118.]

That an appeal was duly filed by your petitioner with the Appellate Court [Certified Record, Clk. Tr. pp. 119-121], and the Appellate Court issued a writ of supersedeas staying the order of the Board of Medical Examiners until

a full determination was made of the petition of your petitioner.

That the Appellate Court rendered its decision on March 20, 1957, affirming the order of the Superior Court.

A petition for rehearing was filed by the petitioner within the time provided for by law, and the petition for rehearing was denied on April 9, 1957.

That on April 10, 1957, the petitioner requested the Appellate Court to grant a rehearing on its own motion under Rule 27, for the reasons set forth in his communication to the Appellate Court, a copy of said communication being attached in the Appendix of Petition for Hearing in the California Supreme Court, marked "Exhibit B". That the Appellate Court did not grant a rehearing.

Petitioner filed a motion before the Honorable Leon Yankwich, Judge of the Federal District Court, to correct the sentence heretofore imposed against the petitioner on his plea of *nolo contendere* to two counts of violating Section 145(b) of the Internal Revenue Code to show that he was convicted of violating Section 3616(a) of the Internal Revenue Code, a misdemeanor. Said motion was made under the authority of Section 2255 of Title 28 of the United States Code, and was denied by the Court.

Thereafter, on or about May 29, 1957, petitioner filed a complaint in the United States District Court, Southern District of California, Central Division, entitled: "Richard Douglas Furnish, M. D., plaintiff, vs. The Board of Medical Examiners of the State of California, defen-

dant", No. 669-57T, seeking declaratory relief to determine petitioner's rights and that the order of The Board of Medical Examiners of the State of California suspending the petitioner from the practice of medicine for one year be declared null and void, and an injunction restraining The Board of Medical Examiners from enforcing its order of suspension, and further asking that in the alternative a Writ of Mandate be issued commanding the said Board of Medical Examiners to cease and desist from enforcing its order of suspension.

That on June 17, 1957 the Honorable Ernest A. Tolin, United States District Judge, made and issued a preliminary injunction restraining the Board of Medical Examiners during the pendency of the action, and until its final determination, or until the Court should otherwise order, from enforcing the order made by The Board of Medical Examiners suspending the petitioner from practicing medicine and surgery.

That the trial of said action is now set for July 3, 1957 at 9:30 A. M. before the said Honorable Ernest A. Tolin, District Judge.

ARGUMENT.

1. A Conviction of a Felony, Not Involving Moral Turpitude, Based on a Plea of Nolo Contendere, Is Not Ground for Disciplinary Action Against a Physician and Surgeon Under Section 2383 of the California Business and Professions Code.

Section 2383 of the California Business and Professions Code originally provided in effect that the conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct subjecting a physician and surgeon to disciplinary action.

In 1951, *Section 2383 of the Business and Professions Code* was amended to provide that a plea of *nolo contendere* made to a charge of a felony, or of any offense involving moral turpitude, is deemed to be a conviction within the meaning of the section providing for disciplinary action. At the time this amendment was enacted a comma was placed after the word "felony" in the first portion of the section so that it now reads: "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct."

It is significant, however, that in the amendment providing that a plea of *nolo contendere* shall be deemed to be a conviction, a comma was not placed after the word "felony."

Therefore, assuming for the sake of discussion that the Legislature had in mind that a conviction of a felony not involving moral turpitude should be a ground for disciplinary action, it is clear the Legislature did not have

in mind that a plea of *nolo contendere* to a felony not involving moral turpitude would come within the class of cases subjecting a physician and surgeon to disciplinary action.

It should be noted that *Section 6101 of the California Business and Professions Code* provides that a conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension of an attorney at law.

When *Section 6101 of the Business and Professions Code* was amended to provide that a plea of *nolo contendere* would be deemed to be a conviction the same as in *Section 2383 of the Business and Professions Code*, the Legislature did not insert a comma after the word "felony" in the first portion of *Section 6101 of the Business and Professions Code* to make a conviction of a felony not involving moral turpitude, a ground for disciplinary action.

The respondent, Board of Medical Examiners, is faced with two horns of a dilemma: Either an inadvertent error was made by the Legislature in inserting a comma after the word "felony" in the first portion of *Section 2383 of the Business and Professions Code*, since it did not see fit to do so in the case of an attorney at law, nor in the portion dealing with a plea of *nolo contendere* to a felony; or if the Legislature intended to make mere conviction of a felony in the case of a physician and surgeon ground for disciplinary action, then to be consistent we must come to the inescapable conclusion that the Legislature intended that in the case of a plea of *nolo contendere* it would be necessary that the felony involve moral turpitude in order to be deemed a conviction for the purpose of disciplinary action, since a comma was not placed after the word "felony."

Federal Judge Leon Yankwich in sentencing the petitioner ordered that he pay a fine and held that "technically speaking, a plea of *nolo contendere* does not carry with it any of the civil penalties." [Certified Record, Clk. Tr. p. 64.] Judge Yankwich stated in passing sentence: "Unless they have professional grounds, certainly his license should not be revoked for this particular offense," and further ruled that the case of the petitioner was different from the usual one involving a physician, declaring:

> "Many a time a physician involved in income tax difficulties is one who resorts to unethical practices and who then tries to cover them up by covering up his income tax. In this particular case there is no such thing. There is no income indicated from any improper sources." [Certified Record, Clk. Tr. pp. 63-64.]

Counsel for the Board of Medical Examiners has conceded that the record shows an absence of facts to establish moral turpitude. [Certified Record, Clk. Tr. p. 66.] The Supreme Court of California has specifically held, relating to lawyers, that a conviction of a felony is insufficient to justify disciplinary action unless there is a showing of moral turpitude.

In re Hallinan, 43 Cal. 2d 243.

The Supreme Court held in the *Hallinan* case that moral turpitude must be inherent in the commission of the offense to warrant disbarment. The Court said on page 247:

> ". . . In view of *Caminetti v. Imperial Mut. L. Ins. Co.*, 59 Cal. App. 2d 476, 490-492 (139 P. 2d 681), holding that a plea of *nolo contendere* is not the equivalent of a plea of guilty and cannot be used in

another proceeding as an admission against the person so pleading, the State Bar was justified in concluding that such a plea was not the equivalent of a 'plea or verdict of guilty' within the meaning of section 6101 of the Business and Professions Code."

And again on page 248, the Court said:

". . . Moral turpitude must be inherent in the commission of the crime itself to warrant summary disbarment under those sections. As we said in *In re Rothrock*, 16 Cal. 2d 449, 454 [106 P. 2d 907, 131 A. L. R. 226], an 'attorney's name will not be stricken from the rolls where the *nature of the particular* crime does not reflect a bad moral character with respect to the duties of the attorney's profession.' (Italics added.) (See *In re McAllister*, *supra*, 14 Cal. 2d 602, 603-604.) (8) The language of the statute itself clearly indicates that an attorney can be summarily disbarred only when the *crime* of which he was convicted involves moral turpitude. Even if it is assumed that statements in the indictment or judgment of conviction describing conduct that goes beyond the essential elements of the crime charged are a part of the 'record of conviction,' as the State Bar contends, the record of conviction is 'conclusive evidence' only when the crime itself necessarily involves moral turpitude." (Emphasis the Court's.)

And on page 250, the Court said:

"The crucial question in the present proceeding, therefore, is whether or not an intent to defraud the United States is an essential element of the crime proscribed by section 145, subdivision (b), of the Internal Revenue Code. If an intent to defraud is not an essential element and a person may be convicted thereunder without proof of that intent or other conduct evidencing moral turpitude, an attorney con-

victed of that crime cannot be summarily disbarred. (13) *Since section 145, subdivision (b), is a United States statute, we must accept the interpretation given it by the United States courts.*" (Italics ours.)

After analyzing the various cases in the United States Courts, the Court, in the *Hallinan* case, continued on page 252:

> "The foregoing cases establish that fraud is not an essential element of the offense proscribed by section 145, subdivision (b), that some measure of bad faith or evil intent is an essential element, but that such bad faith or evil intent, which can be inferred from evidence that the defendant acted without justifiable excuse, without ground for believing his acts were lawful, or in careless disregard of the lawfulness of his acts does not necessarily involve moral turpitude."
>
> *In re Hallinan*, 43 Cal. 2d 243.

We urge that it is difficult to understand how the Legislature could have meant one treatment for a lawyer and another for a doctor. It would be discriminatory, to say the least.

The California Attorney General in his briefs failed completely to account for the Legislature not putting a comma after the word "felony" in the portion of Section 2383 of the Business and Professions Code which deals with the subject of a plea of *nolo contendere* being sufficient to constitute a conviction.

The Appellate Court in its opinion likewise failed to account for the Legislature not placing a comma after the word "felony."

The decision of the Appellate Court rests on an inconsistency. First, the opinion states that the Legislature by

placing a comma after the word "felony" in the first portion of Section 2383 of the Business and Professions Code intended that a mere conviction of a felony without moral turpitude would be sufficient for a disciplinary action; then it states that the Legislature in failing to place a comma after the word "felony" in the second portion of Section 2383 of the Business and Professions Code intended that a plea of *nolo contendere* to a felony without moral turpitude would be sufficient to constitute a conviction.

The Appellate Court endeavors to rely on the case of *Lorenz v. Board of Medical Examiners*, 46 Cal. 2d 684, as authority that a plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of the section. It is respectfully pointed out, however, that the *Lorenz* case holds that moral turpitude must be inherent in the crime itself to warrant cancellation or suspension of a license to practice medicine.

2. The 1951 Amendment Allegedly Making a Conviction of a Felony, Without Moral Turpitude, Ground for Disciplinary Action Against a Physician and Surgeon Under Section 2383 of the California Business and Professions Code Is an Ex Post Facto Law Where Applied to an Act Committed Prior to 1951.

The offenses to which the petitioner entered a plea of *nolo contendere* in the Federal Court involved income taxes for the years 1947 and 1948, with the returns for those years having been filed in 1948 and 1949. [Certified Record, Clk. Tr. p. 51.]

At the time the tax returns were filed Section 2383 of the Business and Professions Code provided: "The con-

viction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct." It should be noted that there was no comma after the word "felony" in 1948 and 1949.

The comma was inserted after the word "felony" in *Section 2383 of the Business and Professions Code* in 1951.

Therefore, the Board of Medical Examiners has applied to your petitioner the law as enacted in 1951, rather than the law as it was in 1947-1949.

Article I, Section 10, of the United States Constitution, provides that no state shall "pass any bill of attainder or *ex post facto* law." The application of such an *ex post facto* law amounts to a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

An *ex post facto* law within constitutional prohibition against the enactment of *ex post facto* laws, is one which makes a crime of an act which when committed was not a crime, or a law which increases the punishment for an act already committed. It has also been held that an *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. It has been said the standard of determination in considering whether a given statute is *ex post facto* arises out of a comparison of the laws themselves and the rights which they confer or the obligations they impose.

Milliken v. McCauley, 25 Fed. Supp. 202, 93 F. 2d 645;

Fuller v. McCauley, 93 F. 2d 1004;

Hall v. People of the State of California, 79 F. 2d 132.

It has been said an ordinance is *ex post facto* if it imposes punishment for past conduct lawful at the time it was engaged in.

Garner v. Board of Public Works, City of Los Angeles, 341 U. S. 716, 95 L. Ed. 1317.

An *ex post facto* law is one which renders a previously innocent action criminal, aggravates or increases the punishment, penalizes an innocent act while assuming to regulate civil rights and remedies, and deprives an accused of some protection or defense previously available, or alters his situation to his disadvantage.

United States v. Forino & Garfinkel, 59 Fed. Supp. 846, 166 F. 2d 887.

3. The Board of Medical Examiners Did Not Sustain Its Burden of Proof That Petitioner Was Convicted of a Felony Involving Moral Turpitude, as Charged in the Accusation.

The Board of Medical Examiners saw fit to file an accusation against appellant charging him with being convicted of felonies and criminal offenses *involving moral turpitude*. (Emphasis ours.) [Certified Record, Clk. Tr. p. 40, lines 12-13.]

The record contains evidence [Affidavit of Dr. Furnish, Certified Record, Clk. Tr. pp. 58-62] in behalf of petitioner showing that there was no moral turpitude.

In addition thereto, the Board of Medical Examiners conceded through its counsel that the Board was not seeking to discipline the petitioner for the conviction of an offense involving moral turpitude. He stated that there was an absence of facts in the record to establish that the convictions involved moral turpitude and that

the complainant had not sustained the burden of proof on the issue of moral turpitude. [Certified Record, Clk. Tr. p. 66.]

The statement of Judge Yankwick in passing sentence on the petitioner clearly negates the thought of any moral turpitude on the part of Dr. Furnish. [Certified Record, Clk. Tr. pp. 63-64.]

4. It Was an Abuse of Discretion to Suspend the Petitioner for One Year.

The punishment imposed by the decision of the Board of Medical Examiners, to-wit, suspension from the practice of medicine for one year, was so overly severe and unwarranted by the evidence as to constitute a prejudicial abuse of discretion.

It has been held that where the order or decision of an administrative agency is so severe it must be clearly supported by the findings, and the findings clearly supported by the weight of the evidence, or a prejudicial abuse of discretion has taken place.

Cooper v. State Board of Health (1951), 102 Cal. App. 2d 906;

Sautter v. Contractors State License Board (1954), 124 Cal. App. 2d 149.

We have here the case of a distinguished physician and surgeon who has been practicing medicine for the past twenty years and who maintains an office at 5718 Hollywood Boulevard, Los Angeles, California. There were some five hundred letters furnished to the Federal Court on behalf of Dr. Furnish from patients who have suffered and claim the doctor is a great man and has done many things for them. [Certified Record, Clk. Tr. pp. 64-65.]

To suspend such a man from practice for one year will destroy his reputation as a medical practitioner in the community, and will deprive his patients of his services during the period of suspension.

In view of all of the circumstances of this case, it clearly appears that this is not the type of case where a physician and surgeon should be deprived of his right to practice medicine, and it would be against the public interest to permit such a harsh penalty to be imposed where no moral turpitude was involved.

5. The State Does Not Have the Right to Reject a Federal Court Finding That Petitioner Is Not Deprived of His Civil Rights.

As hereinbefore pointed out, Federal Judge Leon Yankwich at the time sentence was imposed against petitioner stated:

> "I think on a plea of *nolo contendere* they do not consider it—at least the Medical Board does not consider that as a ground for revoking his license and, unless they have professional grounds, certainly his license should not be revoked for this particular offense. . . . A plea of *nolo contendere* does not carry with it any of the civil penalties." [Certified Record, Clk. Tr. pp. 63-64.]

The Board of Medical Examiners has, by suspending the petitioner, ruled that a plea of *nolo contendere*, without a showing of moral turpitude, does carry civil penalties. This is in direct contravention of the finding of the Court when it passed sentence on the petitioner.

The Board of Medical Examiners, by its action suspending petitioner, has increased the punishment of the petitioner.

In the case of *In re Hallinan*, 43 Cal. 2d 243, cited hereinabove, the Supreme Court of California said on page 250:

> "Since Section 145, Subdivision (b), is a United States statute, we must accept the interpretation given it by the United States Courts."

Notwithstanding this opinion by the California Supreme Court, the petitioner herein has been suspended by an order which contravenes the interpretation placed on the acts of the petitioner in the light of Section 145, Subdivision (b) of the Internal Revenue Code.

It is the generally accepted rule that every Court has inherent power to enforce its judgments and decrees.

> *Florida Guaranteed Securities v. McAllister*, 47 F. 2d 762.

The Court may make such orders and issue such process as may be necessary to render the Court's judgments and decrees effective, and this power is not affected by the fact that the decree is final.

> *Security Trust & Savings Bank v. Southern Pacific*, 6 Cal. App. 2d 581, 45 P. 2d 268, 270.

The power to enforce their decrees is necessarily incident to the jurisdiction of Courts.

> *Commonwealth v. Lewis*, 253 Pa. 171.

It would follow, therefore, that the Federal District Court has the power to restrain The Board of Medical Examiners from enforcing its order suspending the petitioner from practicing medicine for a period of one year in order to be consistent with the Federal Court's finding that the petitioner's plea of *nolo contendere* did not carry with it any civil penalties.

Conclusion.

Wherefore, your petitioner prays that this Court issue a Writ of Certiorari to the District Court of Appeal of the State of California in and for the Second Appellate District, and that the judgment of said Court be reversed to the end that The Board of Medical Examiners of the State of California shall be restrained and enjoined from enforcing its order suspending the petitioner from the practice of medicine, and further that this Court find that the Federal District Court may make its preliminary injunction permanent, whereby The Board of Medical Examiners shall be enjoined from enforcing its order suspending petitioner, and for such other and further relief as to the Court may seem just.

Respectfully submitted,

MURRAY M. CHOTINER, and
RUSSELL E. PARSONS,
By MURRAY M. CHOTINER,
Attorneys for Petitioner, Richard Douglas Furnish, M. D.

EXHIBIT "A".

Opinion of the Appellate Court Affirming Judgment (149 A. C. A. 361).

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

Richard Douglas Furnish, M. D., Petitioner and Appellant, vs. The Board of Medical Examiners of The State of California, Defendant and Respondent. Civil No. 21721.

Filed Mar. 20, 1957.

Appeal from a judgment of the Superior Court of Los Angeles County, John J. Ford, Judge.

For Appellant: Murray M. Chotiner and Russell E. Parsons.

For Respondent: Edmund G. Brown, Attorney General, Howard S. Goldin, Deputy Attorney General.

This is an appeal from a judgment of dismissal after sustaining a demurrer without leave to amend.

An accusation was filed with the Board of Medical Examiners of the State of California, hereinafter referred to as the "Board", on July 21, 1954, wherein it was alleged that Richard Douglas Furnish, hereinafter referred to as the "Doctor," has been guilty of unprofessional conduct contrary to the provisions of section 2383 of the Business and Professions Code, in that on or about May 4, 1953, in the United States District Court he was convicted of two felonies and criminal offenses involving moral turpitude, that is, two counts of violation of Title 26 U. S. C., section 145 (b) (1939 Code), in that he did wilfully and knowingly attempt to defeat and evade a large part of the income tax owing by him to the

United States of America for the calendar years 1947 and 1948, and each of said years.[1] A hearing was held on February 11, 1955, before a hearing officer assigned by the Board, at which time there was introduced into evidence a certified copy of the record of conviction in the case in the District Court, establishing that the Doctor, on May 4, 1953, was convicted following his pleas of *nolo contendere* of two counts of violation of Title 26 U. S. C., section 145 (b) (Income Tax Evasion) for the calendar years of 1947 and 1948. It was conceded at the hearing that there was no evidence to establish that the convictions involved moral turpitude.

The hearing officer in his proposed decision found that the Doctor had been convicted of the two felonies and proposed a one-year suspension of his license to practice medicine and that the execution of such a penalty be suspended for three years on specified terms and conditions. The Board did not adopt the proposed decision, notified the parties accordingly and afforded to them an opportunity to file written arguments with the Board. The Board

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[1]The accusation against appellant, Richard Douglas Furnish, M. D., in paragraph III thereof, charged:

"That the respondent has been guilty of unprofessional conduct contrary to the provisions of Section 2383 of the Business and Professions Code of the State of California, as follows:

"That on or about May 4, 1953, in a proceeding then pending in the United States District Court for the Southern District of California, Central Division, entitled 'United States of America vs. Richard Douglas Furnish (charged as Richard D. Furnsh),' No. 22,754 Criminal, the respondent was convicted of felonies and criminal offenses involving moral turpitude, to wit: two counts of violation of Title 26 U. S. C. Section 145(b), in that he did wilfully and knowingly attempt to defeat and evade a large part of the income tax owing by him to the United States of America for the calendar years 1947 and 1948, and each of said years."

then determined the case and found that the Doctor had been convicted of the felonies in question and ordered that his license be suspended for one year. The Doctor petitioned for a rehearing, which was denied by the Board.

The Doctor then sought a writ of mandamus in the superior court in Los Angeles county, the purpose of which was to set aside the order of the Board. The administrative record was incorporated in the Doctor's first amended petition for a writ of mandate. The demurrer of the Board to the petition was sustained without leave to amend and a judgment of dismissal was thereafter made and entered. This appeal is from the judgment of dismissal.

The Doctor contends that a conviction of a felony, not involving moral turpitude, based on a plea of *nolo contendere*, is not a ground for disciplinary action against a physician and surgeon under section 2383 of the Business and Professions Code. The Board asserts, in this connection, that a conviction of a felony and a conviction of a criminal offense involving moral turpitude are separate, distinct and different grounds for disciplinary action. Further, that by the statute, a conviction following a plea of *nolo contendere* to a charge of a felony, is expressly deemed to be a conviction for the purposes with which we are here concerned. The Doctor also contends that the convictions do not constitute felonies under the California law.

The Doctor further argues that the statute in question is an *ex post facto* law as to him, in that the offenses were committed in 1947 and 1948, and it was the 1951 amendment to the law which was applied to him. He also claims that it was an abuse of discretion for the Board to suspend his license to practice medicine for one year.

Section 2383 of the Business and Professions Code is set forth in a footnote hereto.[2] When the section was added to the statutes in 1937, it consisted of the first two sentences of the section as now constituted, excepting that there was no comma following the word "felony", and no comma following the word "turpitude" in the first sentence.

In 1951, the section was amended by adding the commas to the first sentence and the balance of the section.

Title 26, U. S. C. section 145(b) (1939 Code), reads in part as set forth in the footnote hereto.[3]

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[2] "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct. A plea or verdict of guilty or a conviction following a plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section. The board may order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information or indictment. (Amended by Stats. 1951 ch. 792, Sec. 1.)"

[3] "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

In our opinion, the Doctor failed to state a cause of action warranting the issuance of a writ of mandate. The use of the disjunctive in the section in question, that is, "The conviction of a felony, *or* of any offense involving moral turpitude, constitutes unprofessional conduct" (emphasis added)—makes it abundantly clear that the legislature intended that the *conviction of a felony* in and of itself, without any qualifications, constitutes unprofessional conduct. It is also clear that "any offense involving moral turpitude, constitutes unprofessional conduct"—and such conduct does not necessarily have to be a felony. Further, for the purposes of this proceeding, the record of conviction is conclusive evidence of the questioned conduct, and by the very terms of the section itself, a "plea of *nolo contendere* made to a charge of a felony *or* of any offense involving moral turpitude" (emphasis added)—is deemed to be a conviction within the meaning of the section. (Lorenz v. Board of Medical Examiners, 46 Cal. 2d 684, 686.)

Under the federal law it is the punishment which the statute authorizes which determines whether the crime is a felony or a misdemeanor. (Cartwright v. United States, 146 F. 2d 133, 135.)

For disciplinary purposes the law of the jurisdiction where the crime was committed determines the character of the offense as a felony or a misdemeanor. (Caminetti v. Imperial Mut. L. Ins. Co., 59 Cal. App. 2d 476, 490; Karrell v. Watson, 116 Cal. App. 2d 769, 771, 774; Murrill v. State Board of Accountancy, 97 Cal. App. 2d 709, 710, 712.)

The statute here clearly intended to make the conviction of a felony in the federal courts grounds for

disciplinary action. The use of the words "*nolo contendere*" are, for all intents and purposes, meaningless, unless the legislature so intended, for there is no such plea in the California state courts, and there is such a plea in the federal courts. Had the legislature not so intended, it could, and undoubtedly would have used language such as is contained in sections 2391.5 and 2390 of the Business and Professions Code, where the restrictive term "statutes of this State" is used.

The contention that the 1951 amendment is an *ex post facto* law as to the Doctor is without merit. It is the law that "the phrase, *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws, which punish no party for acts antecedently done which were not punishable at all, or not punishable to the extent or in the manner prescribed." (Watson *et al.* v. Mercer *et ux.*, 8 L. Ed. 876, 884.) The Supreme Court of this State, in Foster v. Police Commissioners, 102 Cal. 483, in substance, held to the same effect and further said (at page 492), "(t)hough not an *ex post facto* law, it is retrospective insofar as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons as a class; nor can we perceive why such evidence should be more conclusive of unfitness were the act done after the passage of the ordinance than if done before."

The revocation or suspension of a license is not penal, but rather, the legislature has provided for such to protect the life, health and welfare of the people at large and to set up a plan whereby those who practice medi-

cine will have the qualifications which will prevent, as far as possible, the evils which could result from ignorance or incompetency or a lack of honesty and integrity.

The Doctor in this case was convicted in 1953, and the suspension was not based upon substantive acts which occurred in 1947 and 1948. The disciplinary action is predicated solely upon the two felony convictions in 1953, almost two years after the law was amended and was in full force and effect. (Karrell v. Watson, *supra*, 116 Cal. App. 2d 769, 774.)

It is urged that in the case of In re Hallinan, 43 Cal. 2d 243, which involved an attorney at law, the Supreme Court specifically held that a conviction of a felony is insufficient to justify disciplinary action unless there is a showing of moral turpitude. Counsel state that it is difficult for the Doctor to understand how the doctor should be treated one way and the attorney another. Suffice it to say that the law is different as to each of them and that the legislature amended the section having to do with the doctor in 1951, as heretofore set forth, and it did not amend section 6101 of the Business and Professions Code, which has to do with the attorney.

The Hallinan case, heretofore referred to, does not hold that a conviction following a plea of *nolo contendere* made to a charge of a felony may not be declared to be grounds for disciplinary action by statute. Under the State Bar Act a conviction without moral turpitude is insufficient for summary disciplinary proceedings, and, at the time of the first Hallinan decision, the *nolo contendere* plea was not designated as a conviction by statute. Under the Medical Practice Act, a hearing is required, a con-

viction of a felony is an independent ground for disciplinary action without regard to whether moral turpitude was in fact involved, and a conviction following a *nolo contendere* plea was expressly defined as a conviction for disciplinary purposes. In In re Hallinan, 48 A. C. 50, the court held that the evidence disclosed that Hallinan had intentionally and for the purpose of personal gain filed false income tax returns and ordered that he be suspended from the practice of law in the state for three years.

The remaining contention of the Doctor is that it was an abuse of discretion to suspend the Doctor's license for one year. The extent of the penalty within the Board's discretion is for the Board to determine. The penalty imposed against the Doctor was well within the power of the Board. (Section 2372, Business and Professions Code; 2 Cal. Jur. 2d, Administrative Law, p. 393; Fuller v. Board of Medical Examiners, 14 Cal. App. 2d 734, 737-738; King v. Board of Medical Examiners 65 Cal. App. 2d 644, 652; Painless Parker v. Board of Dental Exam., 216 Cal. 285, 300; Black v. State Personnel Board, 136 Cal. App. 2d 904, 912; Schneider v. Civil Service Com., 137 Cal. App. 2d 277, 285; Newman v. Board of Civil Service Comrs., 140 Cal. App. 2d 907, 912; Olson v. Watson, 143 A. C. A. 381, 389.)

The judgment is affirmed.

FOURT, *J.*

We concur:

WHITE, *P. J.*,

DORAN, *J.*

EXHIBIT "B".

Opinion of the Appellate Court Denying Application for Rehearing on Court's Motion (150 A. C. A. 324).

In the District Court of Appeal of the State of California, Second Appellate District.

Richard D. Furnish, M. D., Appellant, vs. Board of Medical Examiners, Respondent. Civil No. 21721.

Filed April 19, 1957.

THE COURT.—On March 20, 1957, this court filed its decision affirming the order of the superior court in the above entitled action.

On April 3, 1957, a petition for rehearing was filed by the appellant, within the time provided for by law; the petition for rehearing was denied on April 9, 1957. Appellant has filed in the Supreme Court a petition for hearing.

On April 10 1957, appellant made an application to this court to grant a rehearing on its own motion under Rule 27, Rules on Appeal.

Appellant's present application is basically grounded on the following allegations:

"Petitioner intends to file before the Honorable Leon Yankwich, Judge of the Federal District Court, a motion to correct the sentence heretofore imposed against the petitioner on his plea of *nolo contendere* to two counts of violating Section 145 (b) of the Internal Revenue Code to show that he was convicted of violating Section 3616(a) of the Internal Revenue Code, a misdemeanor.

"Said motion will be made under the authority of Section 2255 of Title 28 of the United States Code;

"The case of *Griffin v. United States* (1949 C. C. A.), 173 F. 2d 909, holds that even though a sentence is served, but if invalid and creates an unjust result the Court will not ignore error;

"The basis of the motion to correct the sentence is that the offense of violating Section 145 (b) of the Internal Revenue Code, a felony, is, in effect, the same as violating Section 3616(a), of the Internal Revenue Code, a misdemeanor."

Upon the authority and for the reasons stated in *Ex Parte Berkoff*, 65 F. Supp. 976, 979, 981, and the holding in *Bozdes v. United States*, 73 F. 2d 772, 776 (certiorari denied, 294 U. S. 710 (55 S. Ct. 506, 79 L. Ed. 1245)), the application is denied.